

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by  
Stephen W. Cooper, Commissioner,  
Department of Human Rights,

Complainant

ORDER DENYING MOTION  
DISMISS AND MOTIONS FOR  
SUMMARY DISPOSITION (JUDGMENT)

vs.

T.L.M. Enterprises, Inc.,  
d/b/a Greenstreets Restaurant  
and Gordon Weber,

Respondents.

The Complaint and the Notice of and Order for Hearing in this matter were filed with the Office of Administrative Hearings on December 8, 1988. The Respondents' Joint and Separate Answer was filed on January 23, 1989. Erica Jacobson, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, has appeared on behalf of the Complainant. Richard J. Sheehan, Harvey, Sheehan & Benson, Attorneys at Law, One Corporate Center, 7401 Metro Boulevard, Suite 555, Minneapolis, Minnesota 55435-3910, has appeared on behalf of the Respondents.

On March 2, 1989 the Respondent, Gordon Weber, filed a Motion to Dismiss the Complaint against him on the ground that a timely charge was not filed against him by the Charging Party. On the same date, Weber filed a Motion for Summary Disposition on the ground that he did not intentionally aid or abet the sexual harassment, if any, perpetrated by a restaurant manager. The Complainant responded to the Respondents' Motion on March 23, 1989 and it filed supplemental written argument on April 20, 1989. On Wednesday, May 3, 1989, oral argument on the Motion was heard at the Office of Administrative Hearings. For purposes of these Motions the record closed at the conclusion of that hearing on May 3.

NOW, THEREFORE, based upon all the files, records and proceedings herein and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED:

- (1) That the Respondents' Motion to Dismiss the Complaint against him on the ground that no timely charge was filed against him is DENIED.

(2) That the Parties' cross-Motions for Summary Judgment on the grounds that there is no genuine issue of material fact with respect to the charge that Gordon Weber intentionally aided or abetted sexual harassment are DENIED.

Dated this 6th day of June, 1989.

JON L. LUNDE  
Administrative Law Judge

MEMORANDUM

Ramona G. Grant (Charging Party) is a former employee of Greenstreets Restaurant in Burnsville, Minnesota. The restaurant was owned by T.L.M. Enterprises, Inc. (TLM or Corporation). Gordon L. Weber was the Corporation's chief executive officer and John Rimarcik was its vice-president. Weber and Rimarcik were the sole shareholders of TLM's stock. Since the time of Grant's employment the restaurant has been sold and the Corporation is no longer in business. Grant worked at the restaurant between 1984 and May 27, 1986. Throughout the course of her employment she was supervised by Rick Cotterman. Grant had a number of ongoing problems with Cotterman which eventually resulted in her filing of three different discrimination charges with the Minnesota Department of Human Rights (Department).

Grant's first charge was filed with the Department on April 10, 1986. It named Greenstreets Restaurant as the "respondent organization" and charged it with a reprisal in violation of Minn. Stat. 363.03, subd. 7(1). That charge has been dismissed by the Department on a finding of no probable cause. Grant filed a second charge with the Department on May 15, 1986 naming Rick Cotterman as the respondent organization. In this charge she alleged that Cotterman had sexually harassed her during the course of her employment in violation of the aiding and abetting provisions of Minn. Stat. 363.03, subd. 6. That charge is still pending and is not the subject of this proceeding. Grant's third charge was filed with the Department on May 28, 1986. It names Greenstreets Restaurant as the respondent organization and charges the restaurant with sexual discrimination in employment under Minn. Stat. 363.03, subd. 1(2)(c). The charge states, in part:

In November of 1985, I complained to Gordon Weber, Owner, of on-going sexual harassment that was directed towards me by Rick Cotterman, Manager. Mr. Weber indicated that he would talk to Mr. Cotterman, yet the harassment continued. I was subjected to harassment including but not limited to the following:

- A. Being followed after work by Mr. Cotterman.
- B. Having Mr. Cotterman inform other employees of his strong feelings for me.
- C. Having my schedule adjusted so as to be on duty at

the same time as Mr. Cotterman.

- D. Repeated invitations to dates, social gatherings,  
etc
- E. Being subject to Mr. Cotternan's jealousy if he felt  
I was spending too much time with customers in the  
restaurant.

F. Having Mr. Cotterman attempt to interfere with my marriage.

These, and other actions on Mr. Cotterman's part have made it extremely difficult for me to perform the duties of my position. Therefore, in an attempt to rectify the situation, on March 23, 1986, several co-workers and myself attended a meeting with Mr. Weber at his home. During this meeting, my co-workers and I made it clear to Mr. Weber that the harassment was happening, and that I was made very uncomfortable by it. Mr. Weber has since expressed the sentiment that he feels this situation is simply a relationship that has gone wrong, that Mr. Cotterman is only misinterpreting my friendliness, that this is not a work related problem, etc. Finally, in an attempt to rectify the situation, my scheduling was changed to keep Mr. Cotterman and myself separated. However, the new schedule arrangements subjects me to a loss of remuneration as compared to the previous schedule.

I believe that my sex was a factor in Respondent's actions.

On June 19, 1986, the Commissioner sent notice of the charge to "Gordon Weber, Owner[,] Greenstreets Restaurant." Among other things, the notice stated that the charge would be investigated and that early settlement options were available to resolve the matter. It also included the name of the investigator assigned to the case and requested a written reply to the charge within twenty days. See, Ex. B to Request for Admissions. Subsequently, two meetings were held with the parties to resolve the matter, but no agreement was reached. On November 6, 1986, the Acting Commissioner issued a notice that probable cause existed to credit Grant's charge that an unfair discriminatory practice had been committed by the Respondent, Greenstreets Restaurant. This notice was also addressed to Mr. Weber, as owner of Greenstreets Restaurant. Ex. D to Request for Admissions. On November 14, 1986, Mr. Sheehan requested conciliation of the charge as suggested in the Acting Commissioner's November 6, 1986 letter. Subsequent conciliation efforts were unsuccessful and on December 31, 1986 the Acting Commissioner notified Mr. Weber, as owner of Greenstreets Restaurant, that the case was being forwarded to the Attorney General's office for litigation. Ex. G to Request for Admissions. Subsequently, on October 10, 1988, the Complainant requested mediation under Minn. Rules pt. 1400.5950. A mediation conference was held on November 22, 1988. Mr. Weber and Mr. Sheehan appeared at the conference before an Administrative Law Judge. Mediation was unsuccessful and on December 8, 1988, a Complaint was issued naming T.L.M. Enterprises, Inc.,

d/b/a Greenstreets Restaurant and Gordon Weber as respondents. In the Complaint it is alleged that Weber aided and abetted Cotterman's sexual harassment of the Charging Party by failing to take timely and appropriate action to stop it in violation of Minn. Stat. S 363.03, subd. 6. Mr. Weber has moved to dismiss the Complaint against him on the grounds that it is time-barred, and he has moved for summary judgment on the grounds that he did not intentionally aid or abet sexual harassment.

IS THE COMMISSIONER'S COMPLAINT AGAINST GORDON WEBER TIME-BARRED AND OUTSIDE THE SUBJECT MATTER JURISDICTION OF THE ADMINISTRATIVE LAW JUDGE?

In her deposition, the Charging Party stated that the harassment she experienced from Cotternan while working for Greenstreets Restaurant stopped on or about March 23, 1986 following her second Complaint to Mr. Weber. Therefore, the timeliness of Ms. Grant's charge is governed by the law in effect at that time. *Buchholz v. Capp Homes, Inc.*, 321 N.W.2d 893, 895 (Minn. 1982). In March, 1986, Minn. Stat. sec. 363.06, subd. 3 stated:

A claim of an unfair discriminatory practice must be filed in a charge with the Commissioner within 300 days after the occurrence of the practice. \* \* \*

The pre-1981 version of this statute had a 6-month filing requirement. The 6-month period was jurisdictional. See, e.g., *Minnesota Mining & Manufacturing Co. v. State*, 289 N.W.2d 396 (Minn. 1979), app. dism., 444 U.S. 1041 (1980). However, due to changes in the language of the statute in 1982, subdivision 3 was transformed into a statute of limitations having more than a jurisdictional purpose. *Carlson v. Independent School District No. 623*, 392 N.W.2d 216, 221 (Minn. 1986). There is no dispute that Grant filed a timely charge against the restaurant (TLM). However, Weber argues that the Complaint made against him -- which was served on December 6, 1988 -- was untimely and is barred. Complainant argues, on the other hand, that the Complaint against Weber is authorized under court decisions which hold that persons not named in a charge can be named as respondents in a subsequent complaint.

The federal courts initially held that persons who were not named in an EEOC charge under Title VII could not be named defendants in a subsequent complaint. See, e.g., *Mitchell v. Jacobson Mfg. Co.*, 32 F.E.P. 582 (E.D.Wis. 1981) (shop steward and company supervisor); *Marques v. Digital Equip. Corp.*, 490 F.Supp. 56, 22 F.E.P. 87 (D.Mass.), aff'd, 637 F.2d 24 (1st.Cir. 1980) (parent corporation); *Novotny v. Great Am. Fed. Savings & Loan Ass'n.*, 22 F.E.P. 440 (W.D.Pa. 1980) (corporate directors). However, in later cases this general rule was qualified by three exceptions:

One recognized exception existing is if the relationship between the named party and the unnamed defendant is that of principal and agent or substantially identical parties. A second exception is recognized if the EEOC could infer from the facts in the charge that the unnamed defendant violated Title VII. In addition, the courts are reluctant to dismiss the unnamed party if he had notice of the EEOC conciliatory efforts and participated in EEOC proceedings.

*Bostic v. Wall*, 588 F.Supp. 994, 35 F.E.P. 1180, 1181-82 (W.D.N.C. 1984), aff'd, 762 F.2d 997, 39 F.E.P. 1568 (4th.Cir. 1985), as cited in 2 A. Larson and L. Larson, *Employment Discrimination*, sec. 49.11(c)(2) at 9B-18 (Larson). The three exceptions noted in *Bostic* have been characterized as the "substantial identity exception", the "factual inference exception" and the

"actual notice/exception'. Larson, supra at 9B-18. The courts are most likely to invoke one of the exceptions when the charge was filed without the assistance of counsel and the charging party may not understand the separate legal identities of corporations and their officers. Id.

In *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890 (7th.Cir. 1981), the court discussed the exception that applies when an unnamed party has been provided with adequate notice of the charge and given an opportunity to participate in conciliation proceedings aimed at voluntary compliance. With respect to this exception the court stated, in part:

The purpose behind this exception is to prevent frustration of the goals of Title VII by not requiring procedural exactness in stating the charges. \* \* \* Complainants often file EEOC charges without the assistance of counsel and are not versed either in the technicalities of pleading or the jurisdictional requirements of the Act itself. \* \* \* They are also not expected to file EEOC charges which specifically articulate in precise terms, a narrow legal wrong which they have suffered, rather EEOC charges are typically detailed in lay persons terms. \* \* \* It is noted, in addition, that Congress could not have intended that a person filing EEOC charges should accurately ascertain, at the risk of later facing dismissal, at the time the charges were made, every separate entity which may have violated Title VII. \* \* \* Thus, given the Act's remedial purposes, charges are to be construed with "utmost liberality" and parties sufficiently named or alluded to in the factual statement are to be joined [citations omitted]

*Eggleston*, supra at 905-906.

The Respondents' position is that the judicially recognized exceptions to the filing requirements in Title VII of the Civil Rights Act (CRA) are not applicable under the Minnesota Human Rights Act (HRA) and, even if they are, the exception relied upon by the Complainant is inapplicable. In determining whether any exceptions to the time limitation for filing charges should be recognized, it is necessary to review the language of the two Acts and Minnesota case law.

Although the time limit for filing a charge of discrimination was a jurisdictional requirement under the 1976 version of Minn. Stat. 363.06, subd. 3, later amendments to the statute transformed the filing requirement into a statute of limitations. *Carlson v. Independent School Dist. No. 623*, 392 N.W.2d 216, 221 (Minn. 1986). Consequently, the time limit is no longer a jurisdictional requirement and it is subject to waiver, estoppel and equitable tolling.

The Respondent admits that the charge naming Greenstreets Restaurant is sufficient against T.L.M., and the Administrative Law Judge has no doubt that a complaint against the Corporation is authorized even though the corporation was not specifically named in the charge. In fact, apart from federal court decisions relating to the CRA, analogous case law supports the propriety of

the charge against the Corporation and Weber. The general rule relating to amendments changing the parties in a case is set forth in 54 C.J.S., Limitations of Actions sec. 228, pp. 299-300. It states, in part:

In general, an amendment to a pleading changing the party against whom a claim is asserted relates back to the date of the original pleading whenever the claim or defense

asserted in the amended pleading arose out of the conduct, transaction, or events set forth or attempted to be set forth in the original pleading, and if within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. \* \* \*

This general rule supports the addition of parties to a contested case under the HRA that were not named in the original charge. Accord: *Fore v. Crop Hail Management*, 270 N.W.2d 13 (Minn. 1978); *Nelson v. Glenwood Hills Hospitals*, 240 Minn. 505, 62 N.W.2d 73 (1953); Rule 15.03, Minn. R. Civ. P.

As a general rule, the Minnesota Supreme Court has relied on case law under the CRA in construing the provisions of the HRA. See, e.g., *Danz v. Jones*, 263 N.W.2d 395 (Minn. 1978). However, in *Carlson v. Independent School Dist. No. 623*, the court noted that there are some "significant differences" between the scope of the HRA and the CRA and the damages which may be awarded under those Acts and that some federal decisions construing the CRA should not be applied in construing the HRA. In spite of the significant differences the Minnesota Supreme Court alluded to in the *Carlson* case, the Administrative Law Judge is persuaded that federal decisions permitting a complaint to be made against persons not specifically named as respondents in a charge filed with the EEOC, may be considered in applying the HRA. The concerns pointed to the *Carlson* case do not preclude consideration of those federal precedents. At most, they require a careful consideration of the extent to which an unnamed party may be prejudiced due to the potential damages that person may be required to pay.

The provisions of the HRA are to be liberally construed to accomplish its purposes. *Continental Can Co., Inc. v. State*, 297 N.W.2d 241 (Minn. 1980). Given this liberal construction, the fact that charging parties are not expected to file charges with the precision of a pleading, and the general rule permitting some changes in pleadings to relate back to the time the original complaint (charge) is filed, it is concluded that the failure to name a specific person as a respondent in the heading of a charge filed with the Department is not a jurisdiction bar to later naming that person in a complaint. Consequently, it must be determined if Grant's charge notified Weber of the alleged violation and if Weber had an adequate opportunity to conciliate the matter. If Weber had notice and an opportunity to conciliate his dismissal motion should be denied.

Mr. Weber had ample notice of Grant's charge against "Greenstreets".  
A  
copy of that charge was mailed to him, as "owner", on June 19, 1986. In  
the  
charge, Weber was specifically mentioned. Hence, he knew that a charge had  
been filed and that the incidents complained of would be subject to

Departmental inquiry. He argues, however, that while he had notice of a charge of discrimination alleging a violation of Minn. Stat. sec. 363.03, subd.

1(2)(c), he had no notice of the aiding and abetting charge under Minn. Stat.

sec. 363.03, subd. 6 until the Complaint was served upon him in December 1988.

Since the charge against Greenstreets did not include a charge of aiding and abetting, Weber argues that the case law relied upon by the Complainant is inapplicable.

Under the CRA, adding an agent of the employer to the charge made against that employer usually does not involve a different charge because the CRA does not have an aiding and abetting provision. Instead, the CRA defines employers to include agents. See, Section 701(b), 42 U.S.C. sec. 2000e, et seq. Hence, under the CRA, persons, like Weber, are liable for discrimination, if at all, under the same statutory provision that the employer is liable. Under the HRA, on the other hand, agents are not included in the definition of employers, and it appears that agents are liable -- for the most part -- only as aiders and abettors.<sup>1</sup>

The question raised by the Respondent's argument is, therefore, whether it makes any difference, for notice purposes, that the liability of a person not named in a Human Rights charge filed with the Department is based on a different statutory provision than the liability of the employer that is named in the charge. The general rule is that a complaint need not mirror the contents of a charge. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 6 F.E.P. Ill (9th Cir. 1973). Under the Sanchez rule, the scope of a complaint, is not limited by the charge but is limited by the scope of the investigation which could reasonably be expected to grow out of the charge. Under *Oubichon*, the complaint may encompass any discrimination that is similar or reasonably related to the allegations in the original charge. The usual argument against allowing expansion of the charge is that doing so deprives the respondent of a chance to settle the additional issues in the conciliation process. When the added claims were actually the subject of conciliation, it has been suggested that the defense should be rejected. See, *Larson*, supra, sec. 49.11(c). Adding a charge of aiding and abetting harassment is within the scope of the investigation which would reasonably be expected to grow out of the initial harassment charge filed by Grant and is reasonably related to the underlying charge of harassment that was filed. Hence, the new charge certainly meets the tests enunciated in *Sanchez* and *Oubichon*.

The facts in *Sanchez* and *Oubichon* were somewhat different than the facts

in this case. They both involved additional charges against a person that had previously been named in a charge. On the other hand, this case involves a new charge against a new party. Nonetheless, since the 'new' charge is similar to the charge that was made against the restaurant, and since Weber is closely related to the restaurant, it is concluded that the differences mentioned are not significant for purposes of determining if Weber had adequate notice. Since Weber had actual notice of the charge filed against the restaurant, since the adequacy and appropriateness of his actions is a necessary element of that charge, and since the charge alleges that Weber did not seriously consider her complaint and suggests that he did not take effective steps to stop the harassment, it is concluded that Weber had

I In State v. Sports and Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), the court held that some officers (agents) may be found liable as "employers". In addition, Professor Auerbach believes that the definition of employers in Minn. Stat. sec 363.03, subd. 1(2) should include agents. Auerbach, The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioner's Model Anti-Discrimination Act, 52 Minn. L. Rev. 231, 235-36 (1967).

sufficient notice of Grant's charge for purposes of the Eggleston case. Charging parties should not be expected to file charges which "specifically articulate in precise terms, a narrow legal wrong which they have suffered". Eggleston, 657 F.2d at 906.

The notice Weber received was that a charge had been filed against the restaurant. Although the restaurant (and not Weber) was named as the "respondent organization", Weber's name appeared in the body of the charge that was made. In *Dickey v. Greene*, 603 F.Supp. 102, 36 Fed. 905 (E.D.N.C. 1984) it was held that the notice requirements under the CRA are satisfied if the name of the party to be charged clearly appears anywhere on the face of the discrimination charge form. 2 603 F. Supp. at 107-08. The form completed by the charging party in this case gave Weber notice that his actions would be scrutinized. He is not only named in the charge, but he is named as the "owner". If he was, in fact, the owner, he would have been liable to the charging party as the employer. The fact that he is not an "owner" but is, instead, a part owner of the corporation that owns the restaurant, means that he is liable to Grant, if at all, as an aider and abettor. There is no evidence that the charging party should have known that Weber was not an owner, and the Administrative Law Judge is persuaded that she should not be held to strict rules of pleading in completing her charge. Since Weber received the charge and was aware of the charging parties mistaken belief of his "ownership", it is concluded that the notice he received was adequate. The record shows that the charging party was aware that aiding and abetting charges could be brought under the HRA because such a charge was brought against Cotterman. Hence, if she had been aware that Weber was not the "owner", she might have initially filed an aiding and abetting charge against him.

Since Weber had adequate notice of the charge and should have known that his conduct would be subject to inquiry, it must be determined if he was given an opportunity to participate in conciliation proceedings aimed at voluntary compliance. In determining whether a person has been given an opportunity to participate in conciliation proceedings, the purpose of conciliation must be balanced against the policy of providing charging parties with relief without "undue encumbrance by procedural requirements." Eggleston, 657 F.2d at 906-907. Conciliation is an important process in the resolution of charges filed with the Department. Under Minn. Stat. sec. 363.06, subd. 5, the Commissioner is required to eliminate unfair discriminatory practices through conciliation and other voluntary processes; however, conciliation is not required if the Commissioner determines that conciliation would be unsuccessful or unproductive. Minn. Stat. sec. 363.06, subd. 4(3). When the right to conciliation has been effectively denied, the courts have permitted charges to be dismissed. See *State, by Gomez-Bethke v. Eastern Airlines, Inc.*, 346 N.W.2d 184, 186 (Minn. Ct. App. 1984).

2 Although the form used by the EEOC in that case had a space for "NAMED IS EMPLOYER . . . WHO DISCRIMINATED AGAINST ME", the Department's form uses the term "respondent organization." The fact that the Department's charge form refers to respondent organizations could easily mislead charging parties because persons are not generally considered to be organizations. Hence, the Department's charge form is as misleading as the EEOC form.

Notice that a charge has been filed is essential because the failure to give notice, while damages are accruing, can later create an obstacle to settlement negotiations and effectively deprive a respondent of its right to conciliate. State, by Gomez-Bethke v. Eastern Airlines, 346 N.W.2d 184, 186 (Minn. Ct. App. 1984). The magnitude of the damage awards available under the HRA compared to the CRA was one factor pointed to by the Supreme Court in Carlson for its decision that an earlier version of Minn. Stat. sec. 363.03 was a jurisdictional prerequisite to suit. Hence, under the HRA, notice is important to provide respondents with an opportunity to explain or correct past conduct without the expense, publicity and time consumption associated with litigation and to resolve the matter at an early date before a substantial amount of damages have accrued.

The requirement for conciliation in Minn. Stat. sec. 363.06, subd. 4(3) ripens after a finding of probable cause has been made. However, as indicated in the notice sent to Weber on June 19, 1986 (Weber Deposition Exhibit 2) the Department has established a 'voluntary early settlement option' which permits a charge to be resolved and dismissed prior to the Department's investigation. In this case, it must be determined if Weber's right to conciliate Grant's charge before or after the Department's probable cause determination was impaired. In making that determination it must be kept in mind that the Complainant generally has the burden of proof. The usual rule is that a party who relies on facts in avoidance of the statute of limitations has the burden of proving such facts. 54 C.J.S., Limitations of Actions, 295.

In this case, the Complainant has met its burden. It has established that Weber received notice of Grant's charge of discrimination and had an opportunity to conciliate. He met with a departmental investigator on two occasions during the summer of 1986 and had an opportunity at that time to resolve the charging party's complaint. Weber also had an opportunity, had he chosen to exercise it, to make adjustments on the job to address her complaints. Subsequently, following the Commissioner's probable cause determination, conciliation was attempted. Two years later, in 1988, Weber had an opportunity to mediate the charging party's Complaint and resolve it at that time. Although the charge of discrimination Grant filed is not an aiding and abetting charge, the harassment charge filed clearly involves the reasonableness of Weber's actions on behalf of the Corporation and he should have known that once it was learned that he was not, in fact, the owner of

Greenstreets Restaurant, but the owner of the corporation that owned the restaurant, that his actions could form the basis for a separate charge. The fact that he is one of two owners of the Corporation, and the only corporate owner actively engaged in the management of the restaurant, establishes that his interest in resolving Grant's charge is nearly identical to the Corporation's interest.

In EEOC v. Tesko Welding & Mfg. Co., 47 Fed. 939 (N.D.111. 1988) the court held that the members of a closely-held, family-run corporation that had not been named in an EEOC charge could be named in a subsequent complaint. The court found that it is unlikely that the family members who refused to settle the EEOC charges on behalf of the corporation would likely have settled the case on their own behalf had they been named. Hence, the court concluded that Tesko was a case where demanding that the charge name all the persons potentially liable would be inconsistent with the purposes of the CRA. There is no reason to reach a different conclusion here. There is no evidence that

Weber's incentive to resolve Grant's charge would have been different if he had been personally named in Grant's charge. Since he was the only active owner of the corporation involved in the operation of the business, since he was referred to as an owner in the charge, thereby putting him on notice that he was believed to be personally liable for the harassment that occurred, and since the charge suggests that Weber did not take her complaints seriously, it is concluded that adding him to the Complaint is authorized and that the Administrative Law Judge has jurisdiction to determine the Complainant's claim against him.

The Third Circuit has adopted a 4-pronged test for determining whether a person not named in a charge can be named in a complaint. The four factors are:

- (1) Whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint.
- (2) Whether, under the circumstances, the interests of the named party are so similar to the unnamed parties that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings.
- (3) Whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party.
- (4) Whether the unnamed party has in some way represented to a complainant that its relationship with the complainant is to be through the named party.

Eggleston, 657 F.2d at 907-908, citing *Juls v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3rd.Cir. 1977).

In this case there is no reason to believe that the charging party could have reasonably determined, at the time her charge was filed, that Weber was not the "owner" of the restaurant and that his liability, if any, would be as an aider and abetter. Moreover, the interests of the corporation are so similar to Weber's interest that for the purpose of obtaining voluntary conciliation and compliance, it really would not have been necessary to include the charge against Weber in conciliation proceedings. If the corporation had resolved Grant's charge, her claim against Weber would also have been resolved. Moreover, Weber was not excluded from, but was the only

employer representative that was involved in conciliation proceedings.  
Third,  
there is no evidence that Weber was prejudiced as a result of Grant's failure to name him as a "respondent organization" in her charge. Weber made some generalized assertions that If he had known of his potential liability as an aider and abetter he might have kept records that were otherwise destroyed. Those assertions do not establish prejudice. There is no evidence that any pertinent documents were lost or destroyed and there is no evidence that the kinds of documents the Corporation would retain would be any different than the kinds of documents Weber would have retained to defend against personal liability.

Although the charge made against Weber does not arise under the same statutory provision as the charge against the corporation, as it would in

actions under the CRA, that difference is not material. Under the CRA, corporate officers and other agents of an employer may be held liable even though they are not specifically named in a charge. There is no reason why corporate officers and other agents of an employer may not be held liable under the HRA as aiders and abettors rather than agents. Under the federal precedents in this area, the charge against an agent is not the precise charge

that is subject to conciliation. Therefore, there is no reason why the precise aiding and abetting charge must have been the focus of the conciliation proceedings that were held. In determining whether there was an opportunity to conciliate, the inquiry should not focus on the precise charge but should focus on the general nature of the charge. Since Grant's charge generally alleged harassment and necessarily involves the adequacy of Weber's response, it is concluded that he was given an adequate opportunity to conciliate and that the third prong of the test cited above has been met. Moreover, as to the fourth prong, there is some evidence that Weber was personally involved in conciliation. For example, his counsel signed some letters as attorney for Gordon Weber. Even though there was no other evidence

that Weber represented that he was representing his own interests in conciliation, the lack of any other representations does not require a different result.

In sum, since Weber received notice of Grant's charge against the Corporation (restaurant) and had an adequate opportunity to resolve her charge

through conciliation or through actions at work, it is concluded that the failure to name him personally as an aider and abetter in a separate charge does not require dismissal of the Complaint. Balancing his rights and interests against those of the charging party, it is concluded that the balance tips in favor of the charging party and that dismissal is inappropriate.

WERE WEBER'S ACTIONS IN RESPONSE TO GRANT'S COMPLAINTS ADEQUATE OR INADEQUATE AS A MATTER OF LAW?

Both parties have moved for summary judgment with respect to the adequacy of Weber's response to Grant's complaints about Cotterman. Mr. Weber has moved that the Complaint against him be dismissed because the deposition of the Charging Party fails to show that Weber intentionally aided or abetted the

sexual harassment, if any, perpetrated by Cotterman. Although the moving papers filed by Weber do not specifically refer to rule 56.02, his Motion was treated as a Motion for Summary Judgment at the time oral arguments on the Motion were heard. Under rule 56.02 a party is entitled to summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on

file together with any affidavits on file show that there is no genuine issue of any material fact and that either party is entitled to judgment as a matter

of law. Rule 56.03, Minn. R. Civ. P.

On a motion for summary judgment, the moving party must establish that there is no genuine issue of material fact. In determining whether genuine fact issues exist, all factual inferences and conclusions must be construed in

favor of the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn.

1982). It is not appropriate to weigh the evidence, and if a genuine issue of material fact exists the motion must be denied, even if it appears unlikely that the opposing party will prevail at the hearing. City of Coon Rapids v Suburban Engineering, Inc., 283 Minn. 151, 167 N.W.2d 493 (1969).

Weber argued that his Motion must be granted because the depositions on file show that after Grant's first complaint to Weber, Cotterman's harassment lessened; after her second complaint to Weber, it stopped; and after her charge was filed with the Department, Cotterman was promptly transferred to another restaurant. Given these "facts" Weber argues that he is entitled to summary judgment on the aiding and abetting issue. That argument is not persuasive.

Grant's deposition shows that after her initial complaint to Weber the nature of Cotterman's harassment temporarily changed, and for a short period of time the only adverse action Cotterman took against her was to reduce her hours. However, Grant's deposition shows that the other forms of harassment Grant initially complained about soon resumed and that they continued until March 23, 1986 when she again complained to Weber. Thereafter, Grant stated that Weber began treating her in a cold and indifferent manner and made her feel unwelcome. Grant's testimony, which is deemed to be true for purposes of Weber's Motion, does not establish that Weber is entitled to summary judgment.

Under Minn. Stat. 363.03, subd. 6, it is an unfair discriminatory practice to intentionally aid and abet sexual harassment. In *Smith v. Hennepin County Technical Center*, Civil No. 4-85-411 (D.Minn. 1988), the United States District Court held that individual administrators have a duty to take prompt and remedial action when they know or should know that employees are being harassed. Slip op. at 39-40. In addition, the court held that a failure to act under the statute may be sufficient to constitute aiding and abetting. *id.* at 40-41. The Court noted that a supervisor's failure to act constitutes an abrogation of supervisory duties and that willful blindness to harassment is equivalent to tacit assent to the harassment that occurs. *id.* at 41. In *Morgan v. Eaton's Dude Ranch*, 239 N.W.2d 761, 762, the Minnesota Supreme Court had occasion to consider the liability of a corporate officer for the torts committed by a corporate employee stating:

It is well settled that a corporate officer is not liable for the torts of the corporation's employees unless he participated in, directed, or was negligent in failing to learn of and prevent the tort. \* \* \*

Under these holdings, it is concluded that a corporate officer, like Weber, may be liable for intentionally aiding and abetting sexual harassment perpetrated by a corporate employee when the officer is aware of the

harassment and fails to take timely and appropriate steps to remedy the situation. In this case, Weber has failed to show that no genuine issue of material fact exists regarding the reasonableness of his response to Grant's complaint against Cotterman. Viewed most favorably to Complainant, the evidence suggests that Grant's first complaint to Weber was not taken seriously or viewed as harassment. Rather, the record suggests that Weber viewed the relationship between Grant and Cotterman as overly friendly and that Cotterman was treating Grant more favorably than he treated other employees by excusing her from performing some of the normal duties waitresses are required to perform, such as clearing tables and busing dishes. The record does not show what steps Weber took to remedy Grant's initial complaint and prevent a recurrence of the discriminatory practices she alleged. For example, the specifics of Grant's initial complaint, as well as Weber's response, are unknown. Since Cotterman's harassing behavior resumed shortly

after her first complaint and even continued after her second complaint, when both Weber and Cotterman treated the Complainant in an angry, ill-tempered manner, it is concluded that Weber has not established that he is entitled to Judgment as a matter of law. On the contrary, a fact issue clearly exists regarding the reasonableness of Weber's actions.

At oral argument on Weber's Motion, the Complainant also moved for summary judgment on the ground that Weber's actions were inadequate as a matter of law. That Motion must also be denied. Viewed most favorably from Weber's perspective, the record shows that he had no notice of her initial complaint and no reason to take any remedial steps prior to March 23, 1986. At that time, the record, viewed most favorably from his perspective, shows that the harassment stopped -- presumably because of Weber's actions -- and that Cotterman was transferred to another restaurant within a month after Grant's initial charge was filed with the Department. Viewed most favorably to Weber, the record does not establish that the actions he took were unreasonable, untimely or inappropriate and that he is, therefore, liable as an aider and abetter as a matter of law. On the contrary, as with Weber's Motion, a genuine fact issue exists with respect to the specifics of the complaint Grant communicated to Weber, if any, in November 1985, the steps Weber took to investigate and stop those practices and prevent their recurrence, and the timeliness and reasonableness of Weber's response to Grant's second complaint in 1986.

In sum, it is concluded that there is a genuine fact issue with respect to Weber's notice of Grant's complaints, the substance of the complaints that were made, and the steps Weber took to remedy her complaints. Without further factual development with respect to these issues, the Administrative Law Judge is persuaded that neither party is entitled to summary judgment as a matter of law.

J.L.L.